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In the Supreme Court of the United States

OCTOBER TERM, 1991

COLUMBIA GORGE UNITED — PROTECTING PEOPLE AND PROPERTY,

Petitioner,

v.

EDWARD MADIGAN, Secretary of Agriculture of the United States; and the COLUMBIA RIVER GORGE COMMISSION,

Respondents,

and

FRIENDS OF COLUMBIA RIVER GORGE

Intervenor-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent Gorge Commission accepts the statement of the question presented as framed by the federal respondent.

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STATEMENT OF THE CASE

Respondent Gorge Commission adopts and incorporates by reference the Statement of the Case set forth in the brief of the federal respondent and supplements section 1 of that statement below.

I. The Setting of the Columbia River Gorge

The Columbia River Gorge is a unique resource of unquestioned national, regional and local significance. The Gorge was created over two million years ago and is over one mile deep. The Columbia River forms the boundary between Oregon and Washington for a portion of its length and is the largest river in the country that flows into the Pacific Ocean. The explorers Lewis and Clark described with awe the area's monumental rock formations and scenic beauty during their famous expedition throughout the Gorge in 1805.[1] 99 Congr. Rec., H 11121 (Oct. 16, 1986).

The geology of the Gorge has created a diversity of habitat for vegetation and wildlife. It is home to rare as well as wild and endangered animal species, including the pine marten and western gray squirrel. Falcons, bald and golden eagles, swans and great blue heron soar over the promontories of this spectacular habitat. Over 800 wildflower species, some endangered and some found nowhere else, bloom in colorful abundance. Vast forests in the western end of the Gorge are juxtaposed against golden, wheat colored hills rising in the east.

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[1] A more recent observer aptly summarized the special nature of the area:

> The beauty of this spectacular canyon is breathtaking. Waterfalls cling to mountainsides. Giant cliffs and rocks stand out as sentinels against the wind and rain. The great Columbia River moves silently and smoothly toward its destined meeting with the Pacific Ocean. The peaks of Mount St. Helens, Mount Adams, and Mount Hood loom as reminders of the fiery prehistoric past.

Senator Daniel Evans, 99 Cong. Rec. S15642 (Oct. 8, 1986).

Significant cultural resources are found along both sides of the Columbia River. Over four hundred recorded, prehistoric archaeological sites document human occupation from centuries past and attest to the area's importance to the Native Americans who have inhabited the area for 10,000 to 20,000 years. Of these sites, slightly over half are on private, county, state and non-Forest Service federal lands. The remainder are within the Gifford Pinchot National Forest.

Native Americans continue to maintain their cultural identity within the Gorge. Commercial, subsistence and ceremonial fishing rights are reserved by the tribes under the treaties of 1855.

The Gorge economy is diverse, consisting principally of forest products, manufacturing, agriculture, tourism, and government. In addition, the Columbia River and its tributaries support substantial fisheries at all times of the year. The Gorge annually attracts millions of visitors, many of whom fish, hike, raft, windsurf or simply explore the area using in part the treasured National Scenic Highway recently included in the National Register of Historic Places.

II. The Need For Regional Planning in the Gorge

Economic activity and associated land uses in the Gorge often both enhance and conflict with the aesthetic beauty of the area. Standing forests, for example, add to the beauty of the area, thus encouraging tourism. Forests also provide timber, which enhances the area's economy too, but only when harvested, often by unsightly clearcutting. Bonneville Dam attracts millions of visitors annually and is a mainstay of the tourism economy, yet visually it is a blight on the Gorge's aesthetic, geologic beauty. Fishermen object to timber practices that cause siltation and harm spawning tributaries. Windsurfers on the Columbia River

complain of large grain barges, and Indian fishermen are at odds with windsurfers, whose boards tear their fishing nets.

Residential and commercial developments add further to the area's conflicts. Developments outside urban areas have eroded the natural beauty of the Gorge area even while providing economic benefits. Blair, *The Columbia River Gorge National Scenic Area: The Act, Its Genesis And Legislative History*, 17 ENV'T L. REV. 863, 874-78 (1987).

Added to the strain caused by the tension between maintaining the area's aesthetic beauty and enhancing economic activities and development is the Gorge area's political diversity. Oregon and Washington share overall political responsibility for the Gorge. In addition, six counties, nine cities, seven ports and twenty-six other entities, including federal and state agencies, all exert control over discrete parts of the Gorge area.

In recent years, as both states confronted problems of growth in conjunction with economic development, regional planning received renewed impetus. Over the past two decades, Oregon and Washington enacted new laws to protect coastal resources, water, forests, fish, wildlife, cultural and archaeological resources and environmental quality in general. Natural resources in the Gorge, however, presented unique difficulties due to the diffusion of regulatory authority and the increased pressure for residential, commercial and industrial development. 99 Congr. Rec., H 10485 (Oct. 16, 1986).

III. The Development of State and Federal Legislation

Efforts to manage the unique aspects of the Columbia River Gorge area date back to 1893, when Congress created the Cascade Range Forest Reserve, which later became the Mount Hood National Forest. In 1937, the Pacific Northwest Regional Planning Commission considered creating an interstate park, in

recognition of the Gorge's national significance. During the 1950's, both Oregon and Washington created Gorge commissions, but they were ineffective due to lack of funding as well as opposition by special interest groups.

By the early 1980's, Northwest policy leaders began calling for a better, more comprehensive approach to protecting the Gorge. Congressional leaders from both states explored several approaches to joint management of the area. In his inaugural address to the Sixty-second Oregon Legislative Assembly on January 10, 1983, Oregon Governor Atiyeh pledged his efforts to achieve protection for the Gorge.

> When Governor Oswald West declared Oregon's beaches a public right-of-way in 1913, his vision preserved a heritage we treasure today. When Governor Tom McCall took heroic steps to begin our state land use program; and Governor Bob Straub won priceless miles for the Willamette River Greenway; their vision created a heritage our children will enjoy.
>
> Before I leave office as Governor of Oregon, I in turn want to see our unmatched Columbia River Gorge preserved and protected for future generations. Like goals of the past, my vision too will require dedication, hard work and the concerned commitment of many Oregonians.

Shortly thereafter, Governor Atiyeh and Governor Spellman of Washington reached agreement on the need for federal legislation to assist the states' efforts to protect the Gorge.

In the beginning, the proposals ranged from full federal regulation of land uses in the Gorge to bi-state control with no federal involvement. During the extensive debates on these proposals between 1982 and 1986, state and federal public officials considered the views of thousands of Gorge residents and other interested citizens. Over time, support solidified in favor of a

partnership of federal, state and local regulation with primary responsibility for control based on the nature of the area within which the land use activity would take place.

Under this format, regulation in urban areas would be the responsibility of state and local officials. Intense development already had occurred in these areas, and further development was viewed as necessary and desirable for the economic health of the Gorge. In contrast, policies for regulation of areas viewed as particularly sensitive or threatened by development would be the primary responsibility of the federal government, which is the dominant landowner in these areas.[2] Finally, policies for regulating the remaining areas would be developed by a bi-state commission whose membership would be chosen by the states' governors and the six counties in the area.

From this consensus and after years of negotiations, the Columbia River Gorge National Scenic Area Act ("Scenic Act" or "Act") was created. 16 U.S.C. § 544, *et seq.* (1986).[3] Congress approved the Act on October 17, 1986. President Reagan signed the Scenic Act on November 17, 1986.

IV. The Structure of the National Scenic Area Act

A. Overview

Congress determined that the purposes of the National Scenic Act are two-fold: first, "to establish a national scenic area to protect and provide for the enhancement of the scenic, cultural,

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[2] In the particularly sensitive areas, designated by the Scenic Act as "special management areas," the federal government is the primary landowner, owning 37.5% of the land.

[3] Although 90% of the land on the Washington side is in private ownership, the legislation was supported by all of Washington's Congressmen and Senators. 99 Congr. Rec., H 10468 (Oct. 16, 1986). All but two members of Oregon's delegation (Representatives Denny Smith and Bob Smith) endorsed the Act. 99 Congr. Rec., H 10466 (Oct. 16, 1986).

recreational, natural resources of the Gorge"; second, to protect and support the Gorge economy. § 544a. To accomplish these purposes, the Scenic Act has three main features. First, it designates a specified portion of the Columbia River Gorge as a National Scenic Area[4] and divides the region into three categories: (1) urban areas, the regulation of which is exempt under the Scenic Act; (2) special management areas; and (3) the remainder, generally referred to as general management areas. § 544b.[5]

Second, the Act contains Congress's advance consent to an agreement between Oregon and Washington by which the two states could create a bi-state commission with regulatory responsibility over natural resources and land use within the Scenic Area. § 544c. As a condition to its consent, Congress required, inter alia, that the Columbia River Gorge Commission carry out its powers and duties in accordance with specified terms of the Act, and that the states vest in the Commission and its members the powers necessary to enable the Act to be carried out. *Id.*

Third, the Act vests in the Secretary of Agriculture specified regulatory powers and responsibilities. Some of these powers and responsibilities assume that the states will agree to form the bi-state commission. For example, that assumption is inherent in the requirement that the Secretary review and approve the Commission's management plan for the scenic area. § 544d(f).

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[4] The Scenic Area lies to the east of Portland, Oregon and Vancouver, Washington. It extends 80 miles along the Columbia River, stretching from the Sandy River on the west to the Deschutes River on the east. The Scenic Area covers portions of six counties: Clark, Skamania and Klickitat Counties in Washington, and Multnomah, Hood River and Wasco Counties in Oregon.

[5] The urban areas include 13,000 acres, the special management areas 112,000 acres and the general management areas 113,000 acres. 99 Congr. Rec., H 10485 (Oct. 16, 1986).

Congress conferred on the Secretary other powers and responsibilities, however, regardless whether the states agreed to the formation of a bi-state commission. Thus, within the special management areas, where the federal government is the principal landowner, Congress required the Secretary to manage federal lands; to inventory resources and assess the area's recreational opportunities; and to develop land use designations and guidelines for land use ordinances so that non-federal lands would be managed consistent with the Scenic Act. Congress further required the Secretary to adopt interim guidelines for the entire scenic area which would apply until adoption of the management plan and would identify land use activities inconsistent with the Act. § 544h.

B. The Columbia River Gorge Commission

The Scenic Act specifies the composition of the Gorge Commission, with six members appointed by the governors and six members appointed by the counties. The Secretary of Agriculture is designated as a non-voting member of the Commission. § 544c(a)(1).

The Act requires the Commission to complete several studies, including a resource inventory, an economic opportunity study and a recreational assessment for the entire Scenic Area incorporating the Secretary's studies for the special management areas (SMA's). § 544d(a). Next, the Act requires the Commission to develop land use designations for the use of non-federal lands outside SMA's. The Commission must designate lands suitable for agriculture, forest and open space use; designate lands outside SMA's suitable for commercial development; and designate areas suitable for resource development. § 544d(b).

As the next step in the planning process, the Commission must adopt a management plan for the entire Scenic Area. The

Act sets forth the general standards the Commission must apply in preparing the plan. The plan must include provisions for protecting natural resources (agricultural lands, forest lands, open space) as well as recreational and educational resources; prohibiting major development actions within special management areas; prohibiting industrial development outside urban areas; and requiring that commercial and residential development outside urban areas not adversely affect the scenic, cultural, recreational and natural resources. § 544d(d)(1)-(9). The Plan must contain land use designations as well as guidelines to be followed by counties in adopting actual zoning ordinances. § 544d(c). During the interim prior to adoption of the Plan, the Commission has responsibility to review and approve all major actions and residential development proposals for consistency with the Act and with the interim guidelines adopted by the Secretary. § 544h(c).[6]

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[6] While the Secretary may disapprove the management plan based on disagreement with the Commission's planning in the general management areas, the Commission has authority to override the Secretary's disapproval. § 544d(f).

The Act contains other miscellaneous, yet important, provisions as follows:

(1) The Secretary is empowered under certain circumstances to acquire undeveloped lands within SMA's using the power of eminent domain. § 544g.

(2) Each state is authorized to develop economic development plans and to be entitled upon certification of the management plan to receive federal grant money for economic development projects within counties with ordinances which the Secretary has approved. § 544i.

(3) The Oregon Department of Transportation is authorized to prepare a program and undertake efforts to preserve and restore the Old Columbia River Highway for public use as a Historic Road, for which it will receive federal funds. § 544j.

(continued...)

C. County Zoning Ordinances

After the commission adopts the management plan, the Act calls for county governments to adopt zoning ordinances to implement the Plan. § 544e. The Commission retains exclusive authority to approve county ordinances for the general management areas. Commission approval of ordinances for special management areas, however, is subject to Secretary concurrence. § 544f. If the Secretary does not concur in a county ordinance for a special management area, the Commission retains the right to override the Secretary's judgment. However, the county faces the loss of federal economic development funds and the threat of federal acquisition of private lands if it fails to obtain the Secretary's acceptance. § 544n.

V. State Ratification

In 1987, both Oregon and Washington enacted legislation incorporating the Scenic Act and forming a compact between the two states to create the Columbia River Gorge Commission. Or. Rev. Stat. § 196.150 (Or. Laws 1987, ch. 14, section 1); Wash. Rev. Code § 43.97.020. During May and June of 1987, the Governors of Oregon and Washington, and county commissioners within the Scenic Area, appointed 12 voting members to the Commission.

The Compact grants to the Gorge Commission the powers necessary to enable it to carry out the duties specified in the

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[6](...continued)

(4) Certain rivers and streams within the scenic area are subjected to the same restrictions on licensing, permitting and exemptions as for rivers in the National Wild and Scenic Rivers systems. § 544k.

(5) Compliance with the Act, interim guidelines, management plan and ordinances within SMA's can be enforced in judicial proceedings brought by the Secretary and by the Commission and citizens in all areas. § 544m.

Scenic Act. Thus, the Compact empowers the Commission to disapprove county land use ordinances if they are inconsistent with the management plan (Article I.a.2.); to enact land use ordinances for any county that declines to enact ordinances consistent with the management plan (Article I.a.3.); and to review and approve or disapprove all proposals for major development action and new residential development within the Scenic Area outside urban areas (Article I.a.4.).

The Compact further specifies the composition of the Commission and requires each state governor and the counties within the scenic area to appoint members as required in the Scenic Act. (Article II). The Compact provides for funding the Commission. (Article IV). Finally, the compact contains a severability clause stating that the invalidity of any portion of the Compact shall not affect the validity of the remaining severable provisions. (Article V).

ARGUMENT

Petitioner fails to show that this case is of sufficient importance that it merits this Court's review.

As a preliminary matter, this case is not about whether government has tread too heavily with land use regulation and effected a taking of private property. Rather, this case is solely about whether the state and federal governments, in cooperatively developing and implementing a comprehensive planning program and process to protect and enhance both the economic and aesthetic resources of a two-million year old national treasure, have properly divided among themselves that responsibility.

The Ninth Circuit Court of Appeals upheld the federal government's role under the Scenic Act on Commerce Clause grounds. It further rejected petitioner's contentions that Congress overstepped its bounds under the Compact Clause and the Tenth

Amendment.[7] Whether this Court reviews and ultimately disagrees with the Ninth Circuit's analysis in this case is of minor practical consequence. The Columbia Gorge Scenic Act is not invalid in its entirety. At a minimum, given the Act's severability clause, Congress's consent to Oregon's and Washington's formation of a bi-state compact and commission to oversee land use development in the Columbia Gorge is valid; the states have lawfully entered into the compact, thus forming the Gorge Commission and empowering it with broad, regulatory land use responsibilities, including adoption of a regional management plan; and the Commission has now adopted the regional management plan. It is simply too late in the day to grant petitioner its wish and turn back the clock to the time when land use planning in the Gorge was purely a local affair. Thus, even if this Court were to agree with petitioner that the Ninth Circuit misapplied Commerce Clause, Tenth Amendment and Compact Clause jurisprudence in upholding the federal government's involvement in protecting and enhancing the scenic, recreational and economic resources of the Columbia River Gorge, the Court's decision would have little effect on the regulatory actions and authority of

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[7] The Ninth Circuit also rejected petitioner's argument "that the regulatory system is a product of a compact that is not valid under the Compact Clause." Pet. App. A-8. The court concluded that under *Cuyler v. Adams*, 449 U.S. 433, 440–41 (1981), Congress clearly could give advance consent to the formation of a compact, and that the consent given here — although imbued with several conditions specifying the content and detail of the compact — satisfied the purpose of the Compact Clause, which is to permit states and the federal government to work together to formulate innovative solutions to complex problems concerning both state and federal interests. The court then rejected petitioner's argument that Congress's consent to the compact, and hence the compact itself, was invalid. Given the court's conclusion that the conditions Congress attached to its consent were valid, the court did not decide whether, given the Act's severability clause, Congress's consent to the compact would remain if the conditions were invalid.

Oregon and Washington and of the bi-state commission they have created.

Nor is there any merit to petitioner's claim that the Tenth Amendment and the Compact Clause do not permit the type of federal-state cooperation reflected in the Scenic Act. Petitioner distorts the legislative record when it claims that the Scenic Act was other than a product of voluntary, state and federal cooperation. No legitimate claim can be made that the political process failed or that the federal government somehow commandeered the states to achieve federal interests.

Even if the correctness of the Ninth Circuit's decision were to have practical importance and even if the decision were incorrect, petitioner fails to justify why the decision merits certiorari review. Petitioner does not show that the Ninth Circuit's analysis conflicts with that of any other circuit. Nor does petitioner demonstrate that the decision is inconsistent with this Court's recent decisions such that this Court should grant certiorari in the exercise of its supervisory powers over the lower federal courts.

I. The correctness of the Ninth Circuit's analysis is of minor regional or local consequence.

Petitioner argues that the federal government lacks enumerated power to have a direct role in land use planning on other than federal lands in the Columbia Gorge because land use planning is of purely local concern. Petitioner further argues that Congress is required, but has failed, to disclose in the Scenic Act the basis for concluding its involvement was necessary in the interests of interstate commerce. Petitioner contends also that the Compact Clause prohibits two states from cooperatively soliciting and utilizing the assistance of the federal government in developing a solution to land use problems of common concern which

neither state alone can master, at least if the federal government attaches specific conditions to its consent to the solution.

Petitioner, however, does not ask this Court, nor did it ask the courts below, to parse out and declare invalid just those Scenic Act provisions detailing the federal government's involvement in protecting the economic and aesthetic resources of the Columbia Gorge. Rather, petitioner seeks to have the Court discard the whole program: the entire Scenic Act, the compact between Oregon and Washington and the bi-state Columbia River Gorge Commission which both states legislatively have charged with specific regional land use powers and responsibilities. In declining to limit its challenge to discrete portions of the Act, petitioner reveals that it is not merely concerned with federal encroachment on land use planning but with any state involvement in what it views to be a purely local government activity.

This Court cannot provide petitioner the relief that it seeks. Whether the Ninth Circuit's analysis in this case is correct, the compact between Oregon and Washington is valid and the Gorge Commission is lawfully constituted and empowered with regional land use planning authority within the Gorge Scenic Area. In § 544c(a) of the Act, Congress gave its advance consent to the formation of a bi-state compact and commission:

> (1) To achieve the purposes of this Act and to facilitate cooperation among the States of Oregon and Washington, and with the United States of America, the consent of Congress is given for an agreement described in this Act pursuant to which, within one year after the date of enactment of this Act —
>
> (A) the States of Oregon and Washington shall establish by way of an interstate agreement a regional agency known as the Columbia River Gorge Commission, * * *

Petitioner argues that this advance consent is invalid because Congress attached impermissible, specific conditions to its consent. Even if the conditions were impermissible, however, Congress's consent remains valid. Petitioner neglects to mention that the Scenic Act contains an express severability provision. § 544p. That provision states that if any of the Act's provisions are declared invalid, the remaining portions are not affected. Thus, even assuming Congress lacked authority to condition in any manner its consent to the formation of the compact and the Columbia Gorge Commission, its consent would be severable from those conditions. It follows then, that the bi-state compact is not invalid nor is the Gorge Commission unlawful for lack of Congressional consent.[8]

Oregon and Washington conferred on the Gorge Commission considerable regional land use planning authority, including the powers: 1) to adopt a management plan specifying the range of and setting forth the standards by which counties determine the permissible land uses within the Scenic Area; 2) to disapprove county land use ordinances if they are inconsistent with the

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[8] The Ninth Circuit stated that "[a]ll parties to this appeal agree that the compact between Washington and Oregon * * * is one which requires such congressional consent[.]" (Pet. App. A-9). That statement is not accurate; the Gorge Commission did not concede such consent was required. In its brief, the Gorge Commission urged that, inasmuch as Congress clearly did consent and that consent was valid, the court did not need to determine whether Congress's consent was required under the Compact Clause. The Gorge Commission then noted that petitioner had not, in any event, cited the complete test for determining whether Congress's consent was required. The commission further argued that petitioner had not explained, under the correct test, how any provision of the compact or the authority the two states gave to the Gorge Commission would "encroach on the just supremacy of the United States." *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978). Thus, even if this Court were to decide that the entire Scenic Act, including Congress's consent, was invalid, petitioner would still be required to demonstrate that the bi-state agreement to form the Gorge Commission was a compact within the meaning of the Compact Clause, thus requiring Congress's consent.

management plan; 3) to enact land use ordinances for a county that declines to enact ordinances consistent with the management plan; and 4) to review and approve or disapprove all proposals for major development action and new residential development within the Scenic Area outside urban areas. To the extent, then, that petitioner's grievance in this case is about the diminution of *local* land use planning authority in the Gorge, that diminution of authority has occurred and will continue regardless of the correctness of the Ninth Circuit's analysis in this case.

For petitioner ultimately to prevail in this matter, petitioner would have to convince this Court not only that petitioner's Commerce Clause, Tenth Amendment and Compact Clause arguments all had merit, it would also have to convince the Ninth Circuit on remand that Congress also lacked authority under the Property Clause to enact land use regulations within special management areas in which the federal government is the dominant land owner. In addition, this Court would have to take the extreme position of declaring null and void Congress's consent to the bi-state agreement, and the Ninth Circuit on remand would have to determine that Congress's consent indeed was required.

Petitioner has failed to demonstrate that it has even a remote chance of overcoming all of these obstacles. Yet, for this case to be of importance regionally or even locally for petitioner and its members — for petitioner to rid the Gorge of a regional planning entity — petitioner must overcome each of them. Whether the Ninth Circuit used the correct analysis in deciding this case simply has little to do with the success or failure of regional land use planning in the Gorge and does not merit this Court's review.

II. Petitioner's Compact Clause and Tenth Amendment arguments lack merit.

A. Oregon and Washington voluntarily sought and accepted Congress's help in developing and implementing a regional planning strategy for the Columbia River Gorge.

Petitioner argues that the Scenic Act is a product of federal power-grabbing, typified by petitioner's characterization of Congress having "arrogated unto itself the power of imposing land use planning on the people of the Gorge." Pet. 8. Petitioner further argues that the states were "coerced" into entering into the Compact due to the threats of withholding federal grant moneys and federal permits needed to pursue "virtually any economic activity" in the Gorge. Pet. 22.[9] The Ninth Circuit rejected these same arguments, observing that the district court had found the absence of coercion and its findings were not clearly erroneous. Pet. App. A-4. Petitioner does not argue that the Ninth Circuit erred in so holding, but merely reasserts the argument in this Court as though the court of appeals had never addressed it.

Petitioner's argument that the federal government coerced the states in any manner lacks merit. The federal government's involvement was solicited by public officials elected to serve at

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[9] Aside from mentioning that federal permits are needed for grazing on federal land and for activities within a wetland, petitioner offers no support for its assertion that the threat of withholding federal permits would stop all economic activity. Not only is petitioner's bald assertion unsupported factually as to general management areas or even special management areas, it is incorrect legally as to urban areas. The authority to withhold federal permits under § 544l(e)(1) expressly excludes activities within urban areas. Nevertheless, petitioner's assertion of extensive, existing federal permit activity in the Gorge certainly is flatly inconsistent with its assertion that Federal interests in the Gorge are insufficient to justify its involvement in land use planning for the Gorge.

both the state and national level. The Scenic Act, quite simply, is the product of voluntary, cooperative federal-state action, the impetus, insistence and ultimate design for which came from the affected states and their elected representatives.

B. Petitioner can make no credible Tenth Amendment claim that the political process failed or that the federal government commandeered the states to achieve federal interests in the Gorge.

Respondent Gorge Commission agrees with the federal government's argument in response to petitioner's Tenth Amendment claim. First, the national political process did not fail; it worked and worked well. Petitioner and its members simply did not get out of the process what they hoped for. Oregon and Washington received from Congress exactly what they requested: federal assistance in preserving the Columbia River Gorge. The division of responsibility and accountability set out in the Scenic Act was the product of a political process in which citizens and local, state and federal elected officials participated extensively. Of course, not everyone agreed fully with the result at the conclusion of the process. But the hearings, workshops and debates surrounding enactment of the legislation plainly evidence its support from 1) Senators and Congressmen; 2) other elected officials from both states, including the governors and legislatures of both states; 3) representatives of various interest groups; and 4) citizens. That petitioner and its members were not among those supporting the Act is hardly an indication that the political process failed.

Second, no legitimate claim can be made that the federal government commandeered the states to achieve federal interests in the Gorge. The "requirements" that Congress levied on the states were not mandatory; the states could opt out of complying

simply by abandoning the regional planning concept.[10] Certainly, Congress offered strong incentives to the states to create the bi-state regulatory commission and to counties to adopt zoning ordinances that comply with the commission's management plan within the highly sensitive special management areas. But as this Court recently held in *New York v. United States*, 112 S. Ct. 2408 (1992), that Congress may make it difficult for states to refuse to regulate in a manner Congress has determined would promote the general welfare is not reason enough to strike down federal legislation. As this Court observed, it has repeatedly upheld federal methods for influencing state policy choices so long as they fall "short of outright coercion." *Id.* at 2423.

Unlike *New York v. United States*, however, to determine the validity or enforceability of the requirements Congress imposed on the states does not require an analysis of whether Congress unduly exacted state compliance. Congress unquestionably had the authority to empower the Secretary of Agriculture to adopt interim guidelines for the entire Scenic Area; the only issue is whether Congress could force the states, acting through the Gorge Commission, to comply with those guidelines. Unquestionably also, Congress could adopt land use designations and guidelines for special management areas and make these binding with respect to federal land; the only issue is whether Congress

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[10] These "requirements" took the form of conditions to Congress's consent to the formation of the compact and the creation of the Gorge Commission. Chief among those conditions were the states' agreement: 1) to abide by interim guidelines for the entire scenic area as developed by the Secretary of Agriculture until the management plan was approved; 2) to apply general standards articulated in the Act for protecting and enhancing agricultural and forest lands, open spaces and recreation resources in development of the management plan; and 3) to incorporate into the management plan land use guidelines for special management areas as developed by the Secretary.

could force the states, acting through the Gorge Commission, to comply with those guidelines on non-federal lands.

However, it is unnecessary in this case to determine whether Congress could, unilaterally and under its enumerated powers, force the states to comply with interim guidelines for the entire scenic area, to adopt into the management plan the Secretary's land use guidelines for both federal and non-federal lands within special management areas and to apply federal standards in adopting the management plan. Those issues are beside the point for the very simple reason that the states voluntarily agreed to abide by these terms when they entered into the compact.

In *New York v. United States*, this Court addressed whether New York, a non-compact state, was obligated to comply with the "take title" provision of the Low-Level Radioactive Waste Act, 42 U.S.C. § 2021b *et seq*. Because New York and five other states had not agreed in a regional compact to be bound by the "take title" provision, the Court had to address whether these states were bound to follow this portion of the Act. But as Justice Stevens, dissenting, correctly noted, notwithstanding the correctness of the majority's holding as to the validity of Congress's requirement as applied to New York, the "take title" provision

> * * * remains enforceable against the 44 States that have joined interstate compacts approved by Congress because the compacting States have, in their agreements, embraced that provision and given it independent effect.

112 S. Ct. at 2447, n.3.

As with the 44 compacting states who voluntarily agreed in regional compacts to be bound by the "take title" provision of the Low-Level Radioactive Waste Act, Oregon and Washington here agreed in their compact to be bound by the requirements of the Scenic Act. Whether Congress, under its Commerce Clause or other enumerated powers, or even under its power in the

Compact Clause to attach conditions to its consent to interstate agreements, could require Oregon and Washington to abide by the requirements of the Act is, perhaps, an interesting question in the abstract. Because, however, Oregon and Washington formally have agreed to comply with these requirements, the issue is largely irrelevant in this case.

III. Petitioner's claims of federal overreaching are without merit and largely moot.

Petitioner's most significant claims of federal overreaching involve: 1) the Secretary of Agriculture's authority to adopt land use guidelines and designations that are binding on both federal and non-federal land located within special management areas; 2) the Secretary's authority to adopt interim guidelines for the entire scenic area that the states, through the Gorge Commission, must apply prior to adoption of the management plan; and 3) the inclusion in the Act of general standards that the Gorge Commission must apply in developing the management plan for the Scenic Area.

For the reasons set forth by the federal government in its brief in opposition at pages 6–7, respondent submits that petitioner's challenge to the Secretary's authority within special management areas is without merit.

Moreover, petitioner's remaining arguments are or soon will be largely moot. Petitioner states in its petition that the management plan for the Scenic Area has now been adopted and has replaced the interim guidelines. Pet. 7.[11] Thus, whether Con-

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[11] Petitioner's statement that the management plan has replaced the interim guidelines is premature. The interim guidelines remain in effect until after counties adopt land use ordinances that implement the plan. § 544h(a). Because, however, county ordinances must be adopted within 270 days of receipt by the counties of the management plan (§ 544e(b)(2)), and because

(continued...)

gress could empower the Secretary of Agriculture to adopt those guidelines and make them binding on the states is largely an academic question of no meaningful significance to this case. Similarly, whether Congress could require the states, acting through the Gorge Commission, to consider general planning standards in adopting the management plan is now largely moot since the plan has been adopted. Even if, however, these questions are not technically moot, their importance has withered far beyond the point of meriting review by this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,
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[11](...continued)

counties received the plan in April of this year, as a practical matter the guidelines have very limited useful life remaining. The guidelines should be replaced by land use ordinances by the first of the year at the latest.